BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA.

OPINION OF THE CIRCUIT COURT OF HARRISON COUNTY

The opinion of the Circuit Court of Harrison County, West Virginia taken from the record, pages 243-353 is as follows:

"Under the statutes of this state each stockholder of a bank is liable for what is called a double liability. That is to say, he must not only lose the amount he paid for his stock but must pay the par value of the stock. Under the statutes that existed prior to the present statute, in liquidating a bank the first thing the bank did was to exhaust all assets except the double liability, and if the bank's assets paid out there was no liability against the stockholders. But the statute has changed all of that.

In *Tabler, Receiver, etc., v. Higginbotham,* 110 West Virginia, page 9, the Supreme Court said,

> 'The statute provides in terms that without waiting to administer the assets, or delaying for any other cause, the receiver shall collect from the several stockholders their liabilities in one suit or in separate suits. * * * The collection of this fund is not to await the administration of other assets; and delay in its collection is not countenanced 'for any other cause'. * * * The statute affords a quicker and more efficacious remedy than heretofore by which the liability may be enforced.'

So then, without waiting to collect their assets, if there be any, it is the duty of the Receiver under the statute to

proceed at once to collect the double liability. The statute also provides that if there is a surplus left, that surplus is returned to the stockholders. I have reference to the Code, serial section 3214 (32).

Objection was made in the *Tabler v. Higginbotham* case that that was wrong, to make a stockholder pay his double liability when it might not be needed, but the Supreme Court in that case said, that the statute so provided and he had no excuse for the statute, the legislature had made the law.

In the case of *Lawhead v. Garlow,* 114 W. Va., page 175, the Supreme Court said:

> 'The constitution and the statutes of our state impose a personal liability on stockholders of banks for debts accruing while they are such stockholders. This is an individual liability of each stockholder to each unsatisfied creditor whose claim accrued during the period when the stockholder owned the stock.'

Of course, I take it, and I recall nothing in the case arising to dispute the authority of the Commissioner of Banking to declare the bank insolvent. However, let me read from *Syllabus* 1 in *Tabler v. Higginbotham,* 110 W. Va., page 9.

> 'In a suit by the statutory receiver of an insolvent bank, appointed by the commissioner of banking and acting under him, against a stockholder of the insolvent bank for personal liability for an amount equal to the par value of the stock held by him, "the finding of the commissioner that the bank is in fact insolvent and on which the suit is predicated, as provided in

> section 32, chapter 23, Acts 1929, is conclusive and cannot be controverted.'

Now, going back to the case cited by counsel from the 6th Ill. District, *RFC vs. McCormick,* this is what our West Virginia cases reply to that.

In the case of *W. J. McClaren et al. v. J. Howard Anderson et al.*, 110 W. Va., page 380, Syl. 1, being as follows:

> 'The liability of stockholders of a bank (authorized by the laws of this State) to its creditors is direct, under the Constitution, Article 11, section 6, and the right of the creditors to enforce personally the liability is not abridged by section 81A, chapter 54, Code, 1932, providing the State Banking Commissioner may enforce the liability.'

In the *McClaren-Anderson* case the plaintiff, was a private individual, who had purchased from the McDowell County Bank claims against certain stockholders. The Merchants and Miners Bank became insolvent in 1927, and the representative made a contract with the McDowell County Bank whereby it agreed to pay certain stockholders certain debts of the bank and the deposit liability, except $45,000.00 secured by deed of trust in favor of the State Planters Bank & Trust Company; certain bonds of certain stockholders were given with that pledge to make good the payment to the bank. The McDowell County Bank could not collect on all those bonds and $20,000.00 remained unpaid. This bank, not wating to bring suit in its own name, assigned its claim to the plaintiffs *W. J. McClaren et al,* and they brought the suit and the question was raised in that case that this private individual

could not collect double liability against the defendant, *J. Howard Anderson et al.*, because that was the duty of the commissioner of banking to do that, but the Supreme Court held, as I have read from the first syllabus, that the authority of the state banking commissioner to collect the double liability did not destroy the right of each individual creditor to collect from each individual stockholder on debts due him.

Let me read syllabus 2, in the case of *Bank of Marlinton v. King*, 116 W. Va., page 259:

> 'Where, with the approval of the state banking commissioner, a person (corporate or individual), by express agreement, takes over the assets (stockholders' liability included) of an insolvent bank and assumes its liabilities, such person acquires the rights of creditors with respect to the enforcement of the constitutional liability of the stockholders of such bank, and may proceed at once to enforce it unless precluded by the instrument under which the liquidation is being effected.'

So under our decisions any creditor of the West Virginia Bang can sue the defendant herein for their double liability just as the RFC could sue him on the double liability, or the Merchants National Bank could sue on the question of double liability, for their particular debts due them, but for no one else. Every individual creditor of the West Virginia Bank can sue Mr. Connell in separate and distinct suits, because of his double liability. There are two thousand and four who have not been paid and collected their $9,000.00. If their claims are not too large they can go before a Justice of the Peace and sue for that double liability. Each one has a particular right against

him, so says the Supreme Court. Now, what kind of a mess, if you will excuse the word "mess", does that put the stockholders in? If all these creditors of the Merchants National Bank and RFC and some of the others whose names apear in the list should bring suit against Mr. Connell, he would soon cry out and say, they are eating him up with costs, and if each individual creditor sought to collect his debt first, so as to get ahead of other creditors, we would have a multitude of creditors triying to get ahead of each other. The Merchants National Bank can sue on all the debts the West Virginia Bank has assigned to it, and the RFC can sue Mr. Connell also, each one of them. For instance, Mr. Marks admits in his statement that he owes $497.00 back on his debt of $17,500.00 note, but he files here with his testimony a judgment transcript for $6,-457.97. If that is not paid the RFC can collect from other stockholders. That is a debt existing against all the stockholders of the West Virginia Bank who have not paid the double liability. What is the remedy for that? A rush of creditors sueing each stockholder for each individual debt. The Merchants National Bank can collect for its particular debts and the RFC can collect for its particular debts and the RFC can collect for its particular debts, but is there any showing, by any evidence, in this case they have the right to collect the debts for the other fellow? Is there any showing the Merchants National Bank can collect debts and pay the money to the RFC, or vice versa? To get rid of that inconvenience of a multitude of suits against stockholders the Legislature has enacted a statute, and let me read from *Lawhead v. Adams*, 113 W. Va., 604 at 607, the case to which counsel referred:

> 'For convenience, in the practical administration of the winding up of the affairs of a state

> banking institution, the commissioner of banking may cause to be enforced against stockholders of such institution the double liability which is imposed on them by the Constitution. And if any surplus remains after discharging the indebtedness of the banking institution and the payment of costs of liquidation, the said surplus shall be paid to the stockholders ratably.'

That is done for convenience only. It is much more convenient for one man to sue all stockholders for all creditors than to have every creditor sue all the stockholders simply to get their money from the other fellow, so the Legislature, for the convenience in liquidation of the bank and to relieve the stockholders from the multiplicity of suits and costs, puts it all together.

The defense has cited the case of *Lawhead v. Adams*, 113 W. Va., at page 604, and the case of *Lawhead v. Edwards*, 114 W. Va., page 597, in which the Supreme Court said, that under the circumstances existing in that case the Receiver had no right to proceed. There was a contract made in that case by the officials of the bank by which the Guyandotte Bank transferred all of its assets, including the double liability to the Clearing House Association and it proceeded to liquidate the bank. Before that contract was made the double liability had been laid by the Commissioner of Banking and it passed with the assets, as an asset of the bank, so there was nothing left but to hold that the Clearing House Association had the right to continue with the liquidation of the bank. It had the authority to collect from any stockholder and pay any creditor. Is there any authority given in this case to the Merchants National Bank to pay the creditors of the RFC? Has there been any authority shown in this case

by which the RFC may pay William Abercrombie, George Abraham, E. R. Ackerly or A. D. Adams? None whatsoever. They can only collect for themselves and pay over for their own use.

In the instant case a different proposition arises. There the authority is given to do the very thing the Banking Commissioner himself could do, namely, to liquidate the bank, not for one, two or three creditors, but for all together. Suppose then, you take the case of *Bank v. King*, there all the funds were transfered by the Commissioner of Banking to the Marlinton Bank from the Hillsboro Bank, and the bank proceeded to collect the double liability. Objection was made and JUDGE MAXWELL, in writing that decision said:

> 'An assessment of one hundred per centum of stock liability was laid by the banking commissioner after the Bank of Hillsboro closed its doors but before the execution of the contract mentioned.'

The Adams case has been discussed very thoroughly and the case of *State v. Lazzelle* has been discussed, decided by the Supreme Court after the Adams case.

Let me quote from that case of *Lawhead v. Lazzelle*, 113 W. Va., at page 896, quoting from page 904, the following:

> 'An observation may not be out of place for the purpose of pointing out the distinction between this case and the case of *Lawhead v. Adams, et al.*, 113 W. Va., page 604," in which I quoted the opinion.
>
> 'In the Adams case, a contract of sale to the Huntington Clearing House Association had

> been entered into. The selling bank made its note to the purchaser for $100,000.00. However, the Banking Commissioner had, previous to the entering into the contract, laid the double liability assessment against the stockholders of the selling bank. After this was done, the purchaser assumed all of the liabilities of the selling bank, and, furthermore, provided in the contract for the discount of its (purchaser's) note by the Twentieth Street Bank making provision for enough actual cash to retire all of the liabilities. * * * then the banking commissioner, through a subsequently appointed receiver, undertook to "enforce double liability of stockholders after all of the assets of the bank had been disposed of and while another agency, under a contractual obligation so to do, was paying off the liabilities of the selling bank.'

That is not the case here. There is no contract with any agency to pay off these debts. The Merchants National Bank did agree to pay the depositors.

> 'We therefore held in the Adams case that the Commissioner had lost the right to enforce the liability through his receiver. We did not hold that any of the circumstances in that case had operated to extinguish the liability.'

The notice of motion for judgment in this case avers that the contract with the RFC, in the form of deed of trust, was entered into on the 18th day of December, 1933. That the contract with the Merchants National Bank of Clarksburg was entered into on the 30th day of

December, 1933. That the bank was declared insolvent on the 9th day of January, 1934, and then, and only then, was the double liability assessed against the stockholders, long after these other contracts were made.

There is no right in the RFC to collect any debts except for itself to pay its own debt. There is no evidence for the RFC to collect other than its own debts. Neither can they collect to the extinguishment of other creditors.

I know Mr. Connell is a poor man, whom I appreciate being one of my best friends. He realizes the fact, when the law is such, he would not expect this Court or any other Court to favor him. I feel that way certainly.

I think, gentlemen, the law I have cited is the law of West Virginia, as found in the decisions of this State, and there is only one thing this Court can do, and, that is, to sustain the motion made by the plaintiff."

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA.

At a Special Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 31st day of July, 1942, the following order was made and entered, to-wit:

John H. Hoffman, Receiver, etc.
vs.
Jack Marks

On a former day, to-wit, July 29th, 1942, came again the *petitioner, Jack Marks,* by CHARLES C. SCOTT, CLARENCE ROGERS, and RAY L. STROTHER, his attorneys, and presented to the Court a petition praying for a writ of

error and supersedeas to a judgment of the Circuit Court of Harrison County rendered in this case on the 13th day of February, 1942, with the record therein accompanying the petition, which being seen and inspected by the Court the writ of error and supersedeas is denied on this the third application, the Court being of the opinion that the judgment of the Circuit Court was plainly right.
A True Copy.

Attest:

B. B. JARVIS,
Clerk Supreme Court of Appeals

JURISDICTION

1. The date of the judgment to be reviewed is February 13, 1942 (R. P. 352). The final order of the Supreme Court of Appeals of West Virginia denying the petition for a writ of error was entered July 31, 1942 (R. P. 394).

2. This review is sought under the provisions of Section 237 of the Judicial Code as amended (U. S. C. A., Title 28, Sec. 344.)

3. The instant case is a civil one, heard and determined in the Circuit Court of Harrison County, West Virginia and involves the construction, application and interpretation of a Federal statute enacted by the Congress on January 22, 1932, entitled, "An Act to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce and industry, and for other purposes,", as said Act read on December 18, 1933, (RFC Act, Title 15, U. S. C. par 601 ct. seq.), and also involves the construction and interpretation of the Constitution of the State of West Virginia and of

Chapter 31, Article 8, Section 32 of the Code of West Virginia.

POINTS AND AUTHORITIES

I.

The Circuit Court of Harrison County decided an important question of Federal law in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit by deciding that the double liability of a bank stockholder did not pass to the RFC upon a loan by the RFC to his bank.

RFC v. McCormick, 102 F (2) 305.

II.

That the Circuit Court of Harrison County in holding that the Commissioner of Banking for the State of West Virginia, had complied with the conditions precedent, imposed by Chapter 31, Article 8, Section 32 of the Code of West Virginia, as to inventory and itemization of liabilities before instituting suit, decided an important question in conflict with applicable decisions of this Court.

Shriver v. Woodbine Savings Bank, 285 U. S. 467, 52 S. Ct. 430.

Marshall County Bank v. Dollar Savings Bank, 119 W. Va. 383, 193 S. E. 915.

III.

The RFC and the Merchants National Bank were liquidating all of the assets of the West Virginia Bank and therefore the Receiver had no authority or right to institute this suit.

Lawhead v. Adams, 113 W. Va. 604, 169 S. E 330.

Lawhead v. Edwards, 114 W. Va. 597, 172 S. E. 895.

IV.

Neither the RFC nor the Merchants National Bank were such creditors as contemplated by the Constitution of West Virginia, Article 11, Section 6.

Continental Illinois, Etc. Co. v. Peoples T. & Sav. Bank, 9 N. E. (2) 53.

V.

That knowledge and consent of the RFC to the merger of the West Virginia Bank with the Merchants National Bank or the assumption of the deposit liability of the West Virginia Bank by the Merchants National Bank precluded the RFC from holding the stockholders of the West Virginia Bank upon their double liability and made the Merchants National Bank liable for any debts of the West Virginia Bank.

Shaw v. Monongahela Ry. Co. 110 W. Va. 155, 157 S. E. 170.

American Express Co. v. Downing, 111 S. E. 265 (Va.)

In Re Harr, 186 A. 120 (Pa.)

Erhard v. Boone State Bank, 66 F. (2) 48 at 57.

Valley Bank v. Malcolm, 23 Ariz. 395, 204 P. 207.

Cole v. Mercantile Trust Co. 30 N. E. 847.

ARGUMENT

I.

The Circuit Court of Harrison County decided an important question of Federal law in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit by deciding that the double liability of a

bank stockholder did not pass to the RFC upon a loan by the RFC to his bank.

The Circuit Court of Harrison County, West Virginia, erred in construing the RFC Act, which we contend applied in this case by reason of the loan of $605,000.00 by the RFC to the West Virginia Bank. The Circuit Court of Appeals for the Seventh Circuit in the case of *RFC v. McCormick*, 102 F. (2d.) 305, at page 319, in correctly construing the Act says:

> "Our conclusion is that the RFC Act contemplated the inclusion—not the exclusion —of bank stockholders' liabilities as part of assets covered by the lien of Government loans."

Our contention is, if the lien of the government in the above case, covered the stockholders' liability, why does it not cover the like security in our case?

The last paragraph of the decision states:

> "* * * that this stockholders' liability was a right which attached when Central gave its note to plaintiff * * *."

We contend that this asset was covered by the Government's lien, and passed to the RFC upon the consumation of the loan.

II.

That the Circuit Court of Harrison County in holding that the Commissioner of Banking for the State of West Virginia had complied with the conditions pre-

cedent, imposed by Chapter 31, Article 8, Section 32 of the Code of West Virginia, as to inventory and itemization of liabilities before instituting suit decided an important quesiton in conflict with applicable decisions of this Court.

Code 1931, Chapter 31, Article 8, Section 32, requires in case of insolvency of a State Bank, that:

> "If the commissioner of banking shall ascertain from any source that the capital of any banking institutuion or other corporation by law placed under the supervision of the department of banking is substantially impaired, and that such institution or other corporation, upon notice from him, does not promptly make good such impairment, or that any banking institution or such other corporation in this State is insolvent, he shall have authority to appoint an employee of the department of banking receiver of such banking institution or other corporation to take charge of the papers, books, records, moneys and assets of every description of such institution or other corporation; and immediately upon taking charge of any such institution or other corporation the commissioner of banking shall make in duplicate, a complete inventory of all assets and an itemized list of all liabilities of such institution or other corporation. The original and copy of such list shall be subscribed and sworn to by the persons making the same and the original shall be filed with the department of banking, and one copy shall open and keep such books and records as are

prescribed by the commissioner of banking.

Such receiver shall have all the powers vested in special receivers by general law. The receiver, under the authority of the commissioner of banking, shall institutue and prosecute any suit or suits necessary to obtain possession of any property and to sell and dispose of the same and to collect all obligations due such institution or other corporation. The receiver in such suit or by separate suits, under the authority of the commissioner of banking, shall enforce against the officers, directors and stockholders any liability incurred by them and existing in favor of the creditors of such institution or other corporation, and collect from such officers, directors and stockholders any sums for which they are liable as aforesaid.

If it shall appear that the assets of such insolvent institution or other corporation are not sufficient to pay in full all of its creditors and depositors, without waiting to administer the assets of such institution or other corporation, or delaying for any other cause, in the same suit or in separate suits, to be forthwith instituted in the same or any other jurisdiction in his name, the receiver, under the authority of the commissioner of banking, shall collect from each of the several stockholders of such institution or other corporation all sums for which they are severally liable to such institutions or other corporation, for the benefit of its creditors."

The Statute says that the receiver *imediately* upon taking charge, shall make a *complete inventory,* this is a condition precedent, that must be satisfied before any form of remedy can be resorted to. The record in this case shows that the West Virginia Bank closed on December 30, 1933 (R. P. 261), that the receiver was appointed on January 9, 1934 (R. P. 217), that the assessment was levied January 9, 1934 and that the appraisement was not made until June 1st, 1934 (R. P. 392).

In the case of *Marshall County Bank v. Wheeling Dollar Savings & Trust Co.,* 119 W. Va. 383, 193 S. E. 915, it is held that the liability of the defendant, if any, cannot be enforced until the condition be shown from which liability arose.

We contend the Court erred in overruling defendant's objection to testimony relative to collection of double liability (R. P. 220) until conditions precedent, such as making in duplicate complete inventory of all assets, etc., had been complied with.

In *Shriver v. Woodbine Sav. Bank of Woodbine,* Iowa, 285 U. S. 467, 52 S. Ct. 430, 76 L. Ed. 884, it is said:

> "And in every case conditions precedent to that statutory liability must be satisfied before any form of remedy can be resorted to."

What does this language mean? Does it mean that when the receiver is appointed for an insolvent bank that he need not go back to ascertain how the assets of the closed bank have been disposed of?

In this case, seven days before the West Virginia Bank's Receiver took charge, $263,175.63 worth of notes had been turned over to the Merchants National Bank

together with other assets (R. P. 236), which the Receiver says he did not have any detailed list of and that, "I *did not* go back into that" (R. P. 236).

Assets, as disclosed by the record, in excess of $605,000.00 were turned over to the RFC (R. P. 240 and 241), and the Merchants National Bank accepted a note for $748,752.53, covering the deposit liability, neither of which institutions have ever made an accounting to the Receiver.

It seems to us that if assets belonging to this bank securing a note for $748,752.53, had been transferred to another bank, the day the bank closed and within ten days before the appointment of the Receiver, that the Receiver should have made some investigation as to what became of the bank's assets, and that some investigation should have been and was, a condition precedent, to be performed before any form of remedy could be resorted to, to collect double liability.

It is inconceivable to us that a bank receiver should take charge of a bank where practically all of the assets had been transferred to two other institutions, leaving the bank without securities, cash or other assets, not pledged to one or the other of these institutions (R. P. 237), without requiring an accounting from each; this the receiver owed to the stockholders and creditors of the bank.

It should be noted that the assets listed by the Receiver on June 1st, 1934, were all turned over to the RFC five months previously or about the same time as the transaction between the West Virginia Bank and the Merchants National Bank took place, and that the Receiver could hardly indulge in scrutenizing the RFC transaction without also seeing the transaction with the Merchants National Bank.

The plaintiff relies heavily upon the testimony that he has control of considerable property, namely: that turned over to the RFC but one wonders how the West Virginia Bank or the *Receiver* would have much control over the collateral for the loan by the RFC when the Circuit Court of Appeals for the Fourth Circuit has stated that the RFC was a *bona fide purchaser for value* of part of this collateral, *Jack Marks v. RFC* decided July 30, 1942. (CCA 4th).

III.

The RFC and the Merchants National Bank were liquidating all of the assets of the West Virginia Bank and therefore the Receiver has no authority or right to institute this suit.

After turning over to the Merchants National Bank the securities listed on R. P. 309, sufficient to secure a note of $784,752.53, and securities sufficient to secure the RFC in its loan of $605,000.00, what was left to be liquidated by the receiver? These two amounts exceeded the total liability of the bank on the day that it closed by $153,357.06 (R. P. 363, "Exhibit Banking Commissioners Report of the West Virginia Bank" which is dated, December 30, 1933, the date that the bank closed.)

Can it be fairly contended by any reasonable person that the liquidation of the West Virginia Bank was being conducted by the receiver, when the Merchants National Bank was liquidating notes formerly owned by the West Virginia Bank in the sum of $236,175.63 (R. P. 236)? Could any one successfully contend that while the RFC and the Merchants National Bank were in possession of assets in excess of the West Virginia Bank's total liability, that

the receiver was liquidating the West Virginia Bank's assets?

In the case of *Lawhead v. Adams*, reported in 113 W. Va. 604, 169 S. E. 330, at page 332 S. E. it is said:

> "It would seem to be a general proposition that it is only when the liquidation of a closed bank is in the control of such receiver that he has any justification for enforcing against stockholders the extra liability imposed on them by the Constitution and Statute."

How can it be honestly contended that the liquidation of this closed bank is in control of such Receiver? Neither the RFC or the Merchants National Bank are such creditors as were contemplated by the framers of the State Constitution. Their loans were not made in the regular course of business; both these institutions knew the West Virginia Bank was being closed and that the Merchants National Bank paid nothing for the Good Will of the West Virginia Bank and they each knew that the bank was being partially liquidated by the other. In the case of *Continental Illinois, etc., Co. v. Peoples T. & Savings Bank*, reported in 9 N. E. (2) 53 at page 57 it is said in speaking of a like situation:

> "The contract stripped the Peoples Bank of every vestige of property it had and of every power bestowed upon it as a banking corporation. It was left with no means of ever paying the debt or any interest on it. It had no way of making a dollar. Although it did not surrender its charter and was not technically dissolved, that fact is immaterial. It could not

> have done so without first satisfying all its obligations. It was completely and forever out of business and the argument that the whole of its liabilities was not, in fact, assumed, can avail nothing in this case."

The president of the West Virginia Bank was also president of the Merchants National Bank and a majority of the directors of the West Virginia Bank were directors of the Merchants National Bank. In other words the West Virginia Bank was in complete control of the Merchants National Bank and this was known by the RFC which made the payment of $432,674.48 (R. P. 309), to the Merchants National Bank out of the $605,000.00 loan made on the assets of the West Virginia Bank, which amount of cash was a God-send to the Merchants National Bank at that critical time.

The fact that the stockholders of the West Virginia Band had no notice of the contemplated loan of the RFC and the taking over by the Merchants National Bank, should relieve them of their double liability as the action of the Merchants National Bank was voluntary and for its benefit, and it should be answerable for the debts of the West Virginia Bank.

In the case of *Shaw v. Monongahela Ry. Co.*, 110 W. Va. 155, 157 S. E. 170, at page 172 S. E. it is said:

> "* * * 'A consolidated corporation is answerable for the debts, obligations, and liabilities of the constituent corporations, whether arising ex contractu or ex delicto.' 14 a Corpus Juris, p. 1072. This principle of law is so well settled that further citations of authority is unnecessary."

And in the case of In Re Harr, 186 A, 120 at page 123 it is said:

> "* * * The well-settled principle applies that where one corporation purchases the business and assets of another, it succeeds to all its rights and is bound as well by all its obligations."

Since the directors of the Merchants National Bank deprived the West Virginia Bank of all means of paying its debts, the Merchants National Bank should be responsible for said debts.

In *Erhard v. Boone State Bank*, 65 F (2) 48 at page 57 it is said:

> "* * * 'A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existance, and place itself beyond the reach of process at law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts; and that is the exact case now before us.' There the owners of two corporations were substantially identical. The court says, page 519 of 13 F.: 'The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and place itself practical-

> ly beyond the reach of creditors, and this without assuming its liabilities.' "

We contend that the com-mingling of the assets of the two banks by the directors, in the absence of notice to the stockholders makes the Merchants National Bank liable for all debts.

In the case of *Ruedy v. Toledo Factories Co.*, 22 N. E. (2) 293 at page 297 it is said:

> "***The com-mongling of assets was done by The Sam Davis Company at its peril, knowing of the obligation of the note and mortgage. All the assets of both corporations are now in one pocket instead of two pockets of the same coat."

The money borrowed on the assets of the West Virginia Bank from the RFC was never turned over to the West Virginia Bank, if it had been, the bank would have had more cash than it had ever had in all its existence and would have had no reason for closing; there was no consideration to the West Virginia Bank for the RFC loan the greater portion of which went to the Merchants National Bank to save it.

The West Virginia Bank was closed on December 30, 1933, and the loans was not consumated until January 9, 1934, (R. P. 309).

The RFC and the Merchants National Bank knew or should have known the result of their acts. In the case of *Cole v. Mercantile Trust Co.* 30 N. E. 847, at page 848, Judge Finch in delivering the opinion of the Court says:

> "* * * Those who accomplished it knew its necessary, and the inevitable, effect would be to

make the corporation unable to pays its debts, and must be held to have intended that consequence of their acts."

Upon the grounds stated in the petition and this brief we respectfully ask that a writ of certiorari be granted.

Respectfully submitted,

CHARLES C. SCOTT,
RAY L. STROTHER,
CLARENCE ROGERS,
Counsel for Petitioner.